

# MANDATE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

N.Y.S.D. Case #  
10-cv-2188(RMB)

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Daniel Patrick Moynihan  
United States Courthouse, 500 Pearl Street, in the City of  
New York, on the 17<sup>th</sup> day of May, two thousand twelve.

PRESENT: RICHARD C. WESLEY,  
RAYMOND J. LOHIER, JR.,  
CHRISTOPHER F. DRONEY,  
*Circuit Judges.*

WESTPORT INSURANCE CORPORATION,

**USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: June 11, 2012**

*Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,*

v.

11-1153-cv (Lead)  
11-1493-cv (XAP)

THE HAMILTON WHARTON GROUP INC., WALTER B. TAYLOR,  
INDIVIDUALLY

*Defendants-Counter-Claimants-Third Party  
Plaintiffs-Appellees-Cross-Appellants,*

INTER-COMMUNITY MEMORIAL HOSPITAL OF NEWFANE, INC.,  
INTERGRATED CARE SYSTEMS, LLC, ATHEALTHCARE, LLC, AARON  
SELIGSON, MARTIN S. ROTHMAN, ABRAHAM V. FRIEDMAN, ESTATE OF  
HERBERT A. ROTHMAN, ESTATE OF BERNARD FEUER PARTNERS, DBA  
BROOKHAVEN BEACH HEALTH RELATED FACILITY, ESTATE OF BERNARD  
FEUER, PARTNERS, DBA ROCKVILLE RESIDENCE MANOR, AMERICAN  
GERI-CARE, INC., BEZALEL NURSING HOME COMPANY, INC.,  
CREATIVE LIFESTYLES, INC., PREFERRED HEALTH CARE SERVICES  
INC., NOW KNOWN AS COTTAGE HOMECARE SERVICES, INC., EAST NEW  
YORK URBAN YOUTH CORPS, E.R.N.H., AKA EAST ROCKAWAY NURSING  
HOME, ELMHURST CARE CENTER, INC., GEORGE KATZ, DBA THE NEW

MANDATE ISSUED ON 06/11/2012

BRIGHTON MANOR OF LONG BEACH HOME FOR ADULTS, SUZIE KLEIN,  
DBA THE NEW BRIGHTON MANOR OF LONG BEACH HOME FOR ADULTS,  
GREATER NEW YORK HOME CARE SYSTEMS, INC., HIGHLAND CARE  
CENTER, INC., HUDSON VALLEY HOME CARE, INC., KESER NURSING &  
REHABILITATION CENTER, INC., LOGAN & LOGAN, INC., FKA CEDAR  
LODGE NURSING HOME, NEW SOUTH SHORE MANOR, NEW YORK COUNTY  
SERVICES REVIEW ORGANIZATION, NYACK MANOR NURSING HOME,  
OYSTER BAY MANOR SENIOR RESIDENCE, INC., PERSONNEL  
MANAGEMENT SERVICES, LLC, QUALITY HEALTHCARE, INC., ROYAL  
HEALTH CARE SERVICES, INC., ST. MICHAEL'S HOME, THE  
DENNELISSE CORPORATION, THE ESTATE OF PAUL C. MAGGIO, DBA  
PATCHOGUE NURSING CENTER, UNIQUE PEOPLE SERVICES, INC.,  
UNITED PRESBYTERIAN AND REFORM ADULT MINISTRIES, DBA  
FLUSHING HOUSE, PRAXIS HOUSING INITIATIVES, INC., DBA THE  
BARBOUR HOTEL, ALTERNATIVE STAFFING, INC., BHHEALTHCARE  
SERVICES, INC., DBA NURSING PERSONNEL, BARKSDALE MANAGEMENT,  
CORP., BRIARWOOD MANOR, INC., BRONXWOOD HOME FOR THE AGED,  
INC., CARING PROFESSIONALS, INC., CEDAR MANOR, INC., COHME,  
INC., CROWN NURSING HOME ASSOCIATES, INC., DENTSERV DENTAL  
SERVICES, P.C., DESMOND McMANUS, DBA BAYSHORE HOME FOR  
ADULTS, TELFORD HOME ASSISTANCE, INC., DBA EXTENDED CARE  
HEALTH SERVICES, EXTENDED NURSING PERSONNEL CHHA, INC., GEM  
HEALTHCARE EMPLOYMENT AGENCY, INC., HOLLISWOOD CARE CENTER,  
INC., INTERIM HOUSING, INC., MEADOWBROOK CARE CENTER, INC.,  
NASSAU-SUFFOLD HOME CARE AND AIDS, INC., RECREATIONAL  
SERVICES, INC., UNION PLAZA NURSING HOME, INC., VISITING  
NURSE REGIONAL HEALTH CARE SYSTEM, INC., WEST SIDE  
FEDERATION FOR SENIOR AND SUPPORTIVE HOUSING, INC.,

*Defendants-Appellees,*

IAAC, INC., INDEPENDENT INSURANCE AGENTS & BROKERS OF NEW YORK, INC.

### *Third-Party Defendants-Appellees.*

JOYCE F. NOYES (Robert P. Conlon, James W. Kienzle, on the brief), Walker Wilcox Matousek LLP, Chicago, IL, for Plaintiff-Counter-Defendant-Appellant-Cross-Appellee Westport Insurance Corporation.

1 KEVIN L. SMITH (Derek I.A. Silverman, on the  
2 brief), Stroock & Stroock & Lavan LLP,  
3 New York, NY, for Defendants-Counter-  
4 Claimants-Third Party Plaintiffs-  
5 Appellees-Cross-Appellants The Hamilton  
6 Wharton Group, Inc., Walter B. Taylor,  
7 individually.

8  
9 Joseph E. Zdarsky, Sr. (David E. Gutowski, on  
10 the brief), Zdarsky Sawicki & Agostinelli  
11 LLP, Buffalo, NY, for Defendants-  
12 Appellees Inter-Community Memorial  
13 Hospital of Newfane, Inc. Eastern Niagara  
14 Hospital, Inc. and Intergrated Care  
15 Systems, LLC.

16  
17 Steven J. Ahmuty, Jr., Timothy R. Capowski,  
18 Gerard S. Rath, Shaub, Ahmuty, Citrin &  
19 Spratt LLP, Lake Success, NY, for  
20 Defendants-Appellees A & T HealthCare,  
21 LLC; Bezalel Nursing Home Company, Inc.;  
22 Creative Lifestyles, Inc.; E.R.N.H.  
23 Corporation, Inc. d/b/a East Rockaway  
24 Nursing Home; Elmhurst Care Center, Inc.;  
25 George Katz d/b/a The New Brighton Manor  
26 of Long Beach Home for Adults; Suzie  
27 Klein d/b/a The New Brighton Manor of  
28 Long Beach Home for Adults; Highland Care  
29 Center, Inc.; Hudson Valley Home Care,  
30 Inc.; New South Shore Manor; Nyack Manor  
31 Nursing Home; Royal Health Care Services,  
32 Inc.; The Dennelisse Corporation; The  
33 Estate of Paul C. Maggio d/b/a Patchogue  
34 Nursing Center; Unique People Services,  
35 Inc.; United Presbyterian and Reformed  
36 Adult Ministries, Inc. d/b/a Flushing  
37 House; and New York County Health  
38 Services Review Organization.

39  
40 Richard Scott Atwater, Gross, Shuman, Brizdle  
41 & Gilfillan, P.C., Buffalo, NY, for  
42 Defendants-Appellees Alternative  
43 Staffing, Inc.; B & H HealthCare  
44 Services, Inc. d/b/a Nursing Personnel;  
45 Barksdale Management, Corp.; Briarwood

1                   *Manor, Inc.; Bronxwood Home for the Aged,*  
2                   *Inc.; Caring Professionals, Inc.; Cedar*  
3                   *Manor, Inc.; COHME, Inc.; Crown Nursing*  
4                   *Home Associates, Inc.; Dentserv Dental*  
5                   *Services, P.C.; Desmond McManus d/b/a*  
6                   *Bayshore Home for Adults; Telford Home*  
7                   *Assistance, Inc., d/b/a Extended Care*  
8                   *Health Services, Extended Nursing*  
9                   *Personnel CHHA, Inc.; GEM Health Care*  
10                  *Employment Agency, Inc.; Holliswood Care*  
11                  *Center, Inc.; Interim Housing, Inc.;*  
12                  *Meadowbrook Care Center, Inc.; Nassau-*  
13                  *Suffolk Home Care & Aides, Inc.;*  
14                  *Recreational Services, Inc.; Union Plaza*  
15                  *Nursing Home, Inc.; Visiting Nurse*  
16                  *Regional Health Care System, Inc.; and*  
17                  *West Side Federation for Senior and*  
18                  *Supportive Housing, Inc.*

19  
20                  Robert J. Grande, Keidel, Weldon & Cunningham,  
21                  LLP, White Plains, NY, for Third-Party  
22                  Defendants-Appellees IAAC, Inc. and  
23                  Independent Insurance Agents & Brokers of  
24                  New York, Inc.

25  
26                  Robert Leonard Schonfeld, Moritt Hock &  
27                  Hamroff LLP, Garden City, NY, for Praxis  
28                  Housing Initiatives, Inc. d/b/a Barbour  
29                  Hotel.

30  
31                  Appeal from the United States District Court for the  
32                  Southern District of New York (Berman, J.).

33                  **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**

34  
35                  **AND DECREED** that the judgment of the United States District  
36                  Court for the Southern District of New York is **AFFIRMED**.

37                  Appellant Westport Insurance Corporation ("Westport")  
38                  appeals from the February 23, 2011 Decision and Order of the  
39                  United States District Court for the Southern District of

1 New York (Berman, J.), granting summary judgment to the  
2 appellees and dismissing Westport's declaratory judgment  
3 action (the "DJ Order"). Westport sought a declaratory  
4 judgment that a professional liability insurance policy (the  
5 "Policy") issued by Westport to Appellee Hamilton Wharton  
6 Group, Inc. ("Hamilton Wharton") does not impose upon  
7 Westport either a duty to defend or a duty to indemnify  
8 Hamilton Wharton in four lawsuits filed in New York State  
9 Supreme Court (the "State Actions") against Hamilton Wharton  
10 and its owner, Walter B. Taylor ("Taylor," together with  
11 Hamilton Wharton, the "Defendants"). In the DJ Order, the  
12 district court found that (i) Westport had a duty to defend  
13 the Defendants and (ii) the complaint should be dismissed as  
14 "premature" with respect to the Defendants' duty to  
15 indemnify because "issues of fact on which the insurance  
16 coverage depends" have yet to be adjudicated in the State  
17 Actions. On March 31, 2011, the district court awarded the  
18 Defendants' counsel attorneys' fees in the amount of  
19 \$159,477.50 and costs of \$26,317.91 (the "Attorneys' Fees  
20 Award"). Both Westport and the Defendants also appeal from  
21 the Attorneys' Fees Award. We assume the parties'  
22 familiarity with the facts, procedural history, and issues  
23 presented for review.

1        We review *de novo* the district court's grant of summary  
2 judgment, "construing the evidence in the light most  
3 favorable to the non-moving party and drawing all reasonable  
4 inferences in its favor." *Costello v. City of Burlington*,  
5 632 F.3d 41, 45 (2d Cir. 2011); see Fed. R. Civ. P. 56(a).

6        The district court did not err in concluding that the  
7 State Actions trigger Westport's duty to defend. Under New  
8 York law—which the parties agree applies in this case—an  
9 insurer's duty to defend is broader than its duty to  
10 indemnify and has been described by the New York Court of  
11 Appeals as "exceedingly broad." *Colon v. Aetna Life & Cas.*  
12 *Ins. Co.*, 66 N.Y.2d 6, 8 (1985). Indeed, "[s]o long as the  
13 claims [asserted against the insured] may rationally be said  
14 to fall within policy coverage, whatever may later prove to  
15 be the limits of the insurer's responsibility to pay, there  
16 is no doubt that it is obligated to defend." *Seaboard Sur.*  
17 *Co. v. Gillette Co.*, 64 N.Y.2d 304, 310-11 (1984)  
18 (alterations in original) (internal quotation marks  
19 omitted).

20        Here, the claims asserted against Westport may  
21 rationally be said to fall within the Policy's coverage.  
22 The "professional services" contemplated by the Policy  
23 encompass at least some of the activities alleged in the

1 State Actions, which included, *inter alia*, allegations that  
2 the Defendants were negligent in handling their funds by:  
3 continuing to sign up new participants to join the trust;  
4 failing to hire an accountant; offering unwarranted  
5 discounts to trust members; failing to implement safety  
6 audits; and failing to conduct payroll audits.

7 Westport contends that the Policy's Insolvency  
8 Exclusion bars coverage for the underlying complaints and  
9 that the district court erred because it failed to analyze  
10 this exclusion. The district court did not address the  
11 applicability of the Insolvency Exclusion for good reason.  
12 To the extent the issue was raised below at all, Westport  
13 offered only conclusory assertions that the Insolvency  
14 Exclusion barred coverage even though Westport bore the  
15 "heavy burden" of establishing the applicability of the  
16 exclusion. *Commercial Union Assurance Co. v. Oak Park*  
17 *Marina, Inc.*, 198 F.3d 55, 61 (2d Cir. 1999). Westport's  
18 conclusory assertions, rather than argument, were  
19 insufficient to preserve this issue for appellate review.  
20 See *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d  
21 151, 154 (2d Cir. 1999). "'It is a well-established general  
22 rule that an appellate court will not consider an issue  
23 raised for the first time on appeal.'" *Allianz Ins. Co. v.*

1       *Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (quoting *Greene v.*  
2       *United States*, 13 F.3d 577, 586 (2d Cir. 1994)). While we  
3       have the discretion to relax this rule to consider a purely  
4       legal issue or to avoid manifest injustice, we see no reason  
5       to exercise such discretion under the circumstances of this  
6       case. *Id.* Moreover, we are not persuaded that *all* of the  
7       claims against Hamilton Wharton and Taylor in the underlying  
8       complaints would fall within the scope of the Insolvency  
9       Exclusion. Notably, the Niagara complaint lacks any  
10      allegations referring to the trust's insolvency or financial  
11      inability to pay.

12           Next, Westport contends that the district court erred  
13      in dismissing as premature Westport's action as to its duty  
14      to indemnify. We review a district court's decision to  
15      refuse to exercise jurisdiction over a declaratory judgment  
16      action "deferentially, for abuse of discretion." *Dow Jones*  
17      & Co. v. *Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).  
18      Where, as here, "another suit is pending in a state court  
19      presenting the same issues, not governed by federal law,  
20      between the same parties," it is entirely appropriate for a  
21      district court to dismiss a declaratory judgment action.  
22      *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)  
23      (internal quotation marks omitted). As the district court

1 noted, the declaratory judgment action and the State Actions  
2 have numerous unresolved issues in common, including whether  
3 the Defendants were negligent or breached fiduciary or  
4 contractual obligations. As a result, the district court  
5 did not abuse its discretion in dismissing as premature the  
6 indemnification portion of Westport's declaratory judgment  
7 action.

8 We also reject Westport's contention that it was  
9 prejudiced because the district court denied its request for  
10 discovery in response to the Defendants' motion for summary  
11 judgment. See Fed. R. Civ. P. 56(d); see also *Gualandi v.*  
12 *Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004). In assessing  
13 whether Westport had a duty to defend and indemnify, the  
14 district court was required to "compare the allegations of  
15 the complaint to the terms of the policy." *A. Meyers & Sons*  
16 *Corp. v. Zurich Am. Ins. Grp.*, 74 N.Y.2d 298, 302 (1989).  
17 It was not required to consider the additional materials  
18 submitted by the Defendants, and there is no evidence that  
19 it actually did so. Accordingly, the district court did not  
20 abuse its discretion in precluding Westport from conducting  
21 additional discovery.

22 Next, we address the parties' objections to the  
23 Attorneys' Fees Award. The scope of our review in this

1 regard is "circumscribed." *Chambless v. Masters, Mates &*  
2 *Pilots Pension Plan*, 885 F.2d 1053, 1057 (2d Cir. 1989).  
3 The district court has "the best vantage point from which to  
4 assess the skill of the attorneys and the amount of time  
5 reasonably needed to litigate a case." *Id.* at 1057-58.  
6 Moreover, "attorney's fees are to be awarded with an eye to  
7 moderation, seeking to avoid either the reality or the  
8 appearance of awarding windfall fees." *N.Y. State Ass'n for*  
9 *Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139 (2d  
10 Cir. 1983)(citation and internal quotation marks omitted).  
11 Thus, the district court's calculation of attorneys' fees  
12 will not be disturbed absent a clear abuse of discretion.  
13 *Chambless*, 885 F.2d at 1058.

14 The district court did not abuse its discretion by  
15 reducing the Defendants' counsel's hourly rates. The  
16 district court relied on several valid considerations in  
17 making its determination, including: the limited time and  
18 labor required, the relatively straightforward nature of the  
19 case, the absence of severe time demands, and the rates  
20 awarded in similar cases. See, e.g., *U.S. Football League*  
21 *v. Nat'l Football League*, 887 F.2d 408, 415 (2d Cir. 1989)  
22 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d  
23 714, 717-19 (5th Cir. 1974)).

1           The Defendants counter that the district court relied  
2 on "historic rates that no longer apply, as well as the  
3 rates of opposing counsel." We disagree. The Defendants  
4 have not demonstrated that any of the rates relied on by the  
5 district court no longer prevail in the Southern District of  
6 New York. It was also not error for the district court to  
7 consider the rates charged to Westport's counsel. This was  
8 one of several factors relied on by the district court, and  
9 it was certainly not an unreasonable consideration given  
10 that the Defendants' counsel requested fees were  
11 approximately four times greater than the fees Westport paid  
12 to its own counsel for the same work.

13           We also decline Westport's invitation to further reduce  
14 the Attorneys' Fees Award. Westport's reliance on the  
15 hourly rates of other appellees, as well as the hourly rates  
16 awarded in *GuideOne Specialty Mutual Insurance Co. v.*  
17 *Congregation Adas Yereim*, No. 1:04-cv-5300 (ENV)(JO), 2009  
18 WL 3241757, at \*3 (E.D.N.Y. Sept. 30, 2009), is misplaced.  
19 Counsel for the other appellees are located in Buffalo or in  
20 Lake Success, New York and thus, do not represent the  
21 "prevailing community a district court should consider to  
22 determine" the reasonable hourly rate. *Reiter v. MTA N.Y.*  
23 *City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006).

1      Similarly, *GuideOne* involved an award to attorneys in the  
2      Eastern District of New York, and the *GuideOne* court noted  
3      that Manhattan attorneys' rates are higher than those in  
4      Brooklyn. *Id.* at \*3.

5           In addition, Westport's contention that the proposed  
6      time entries were unreasonable is unavailing. The district  
7      court reduced the number of hours credited to the  
8      Defendants' counsel by 35% from 772.8 hours to approximately  
9      502.3 hours. Westport admitted that its own counsel devoted  
10     just over 400 hours to this litigation. The district court  
11     did not abuse its discretion in reducing the number of hours  
12     by 35%.

13        Finally, the district court did not abuse its  
14     discretion in awarding costs. The costs sought by the  
15     Defendants' counsel reflected, among other things, in-house  
16     duplication costs, telephone charges, meals, overtime, local  
17     transportation, postage, electronic legal research, and  
18     messenger service. All of these categories of costs are  
19     "the sort of expenses that may ordinarily be recovered" as  
20     part of a fee award, and are not treated as "overhead  
21     expenses." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763  
22     (2d Cir. 1998); see also *Kuzma v. Internal Revenue Serv.*,  
23     821 F.2d 930, 933-34 (2d Cir. 1987); *Aston v. Sec. of Health*

1 and Human Servs., 808 F.2d 9, 12 (2d Cir. 1986).

2 Accordingly, it was not error for the district court to  
3 compensate the Defendants' counsel for a portion of these  
4 costs.

5 We have considered all of the parties' remaining  
6 arguments and, after a thorough review of the record, find  
7 them to be without merit.

8 For the foregoing reasons, the judgment of the district  
9 court is hereby **AFFIRMED**. As a result, the Third-Party  
10 Defendants' motion to strike the Defendants' request for  
11 leave to re-file the Third-Party Complaint is denied as  
12 MOOT.

13 FOR THE COURT:  
14 Catherine O'Hagan Wolfe, Clerk  
15  
16

Catherine O'Hagan Wolfe



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit



Catherine O'Hagan Wolfe